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## ABSTRACT

Unfair competition is a complex problem affecting all areas of American business, including the communications media. Piracy of material, an alarmingly widespread example of unfair competition, involves legal as well as ethical questions. This monograph uses the historical approach to trace the development of common-law precedent and trends and then summarizes, analyzes, and evaluates current legal cases involving unfair competition. The monograph concludes that news piracy has been construed to be punished within the legal precedents and interpretation that involve unfair competition. (Author/RL)

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PAUL W. SULLIVAN

*News Piracy: Unfair Competition  
and the Misappropriation Doctrine*

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C. Richard Hofstetter, "News Bias in the 1972 Campaign: A Cross-Media Analysis" (10/28/77).

Eric J. Zanot, "The National Advertising Review Board, 1971 - 1976" (1/4/78).

Philip Palmgreen, "Media Use and Political Knowledge" (1/5/78).

R. Gordon Shepherd, "Science News of a Controversial Issue: Marijuana" (3/20/78).

THE POLICY of free competition, one of the fundamental tenets of American economic life, has found expression in the law. "Much of the commercial and regulatory law of the United States can be viewed as attempts to define and protect free competition and to resolve the conflict between unbridled competition on the one hand and commercial stability and social progress on the other."<sup>1</sup> The common law principles of unfair competition fall into this category.

Unfair competition is a complex problem affecting all areas of American business, including the communications media. Piracy of material, an alarmingly widespread manifestation of unfair competition, involves legal as well as ethical questions. This monograph uses the historical approach to trace the development of common law precedent and trends, then summarizes, analyzes and evaluates current unfair competition cases. Finally an attempt is made to pin down the current definition of unfair competition as it pertains to news piracy, which should then make it possible to devise a set of practical guidelines for the media practitioner to follow in dealing with the problem.

### *The Principle of Unfair Competition*

A continuing problem for the news media in highly competitive situations is the "piracy" of material which has been gathered, verified and processed at considerable cost. While the news element of the story itself is not copyrightable,<sup>2</sup> it is still afforded some protection. Also, it is possible to copyright a news story that is a literary production.<sup>3</sup> But far more important to a newsgathering organization than copyright protection is the principle that news is quasi property, which provides the protection of equity jurisdiction of the courts in cases of unfair competition, offers injunctive relief and establishes the right to damages stemming from the unauthorized use of standard news material.

The problem is not as clear-cut as it may appear; complex legal principles that have evolved under common law are involved. Copyright law, on the other hand, is clearly established by written federal statutes dating from 1790 which derive their authority from Article I, Section 8, Clause 8 of the Constitution. It offers definitive legal protection to an injured party and injuries are specifically set forth, thus leaving little room for interpretation.

The question whether newspapers or news agencies could claim protection under copyright law has been debated in the United States since the 19th century.<sup>4</sup> By 1900 the federal courts had excluded daily newspapers from copyright protection covering entire issues<sup>5</sup> on the grounds that in a democratic society general facts are part of the public domain. However, the 1909 general revision of the Copyright Law made all periodicals, including newspapers, eligible for limited legal protection. Those portions of a newspaper which were original literary creations were protected; general news material still was not. Congress was pressured to amend the law in favor of newspapers, but never did. In 1916 a bill proposing to amend the copyright law to afford 24-hour protection for news died in committee.

Copyright law, as it pertained to newspapers, could be found for many years under Title 17 of the *United States Code*. Section 5 of the old Title 17 set forth specifically the classes of published work that were eligible for copyright, listing "periodicals, including newspapers," as one of the classifications.<sup>6</sup> The new Copyright Act, approved October 19, 1976, is far less specific:

§ 120. Subject matter of copyright: In general.

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works; . . .
- (5) pictorial, graphic, and sculptural works; . . .<sup>7</sup>

Newspapers are, however, entitled to display a blanket copyright on the front page which gives the proprietor all the rights he would have if each part were individually copyrighted, but it covers only that material which the newspaper was eligible to copyright in the first place. News is still excluded from this protection.<sup>8</sup>

News was to be part of the public domain, but newsgathering offered an opportunity for protection through the English doctrine of "unfair competition" which had become established in the United States. The highly interpretable principle of unfair competition is found in the common law under the general category of "Trade-Marks, Trade-Names and Unfair Competition."<sup>9</sup> Through a comprehensive series of steps, unfair competition can be taken from an abstract principle to a specific application of property rights in newsgathering.

Unfair competition is a tort, a legal wrong, for which the courts may provide a remedy such as an injunction. The basis for the intervention of a court of equity to restrain unfair competition and grant injunctive relief is "subterfuge, piracy, wrongdoing, or unfair tactics of the competitor."<sup>10</sup> Added to this definition in recent years is "misappropriation."

Unfair competition is governed by the law of the state in which it occurs. If the same unfair competition occurs in a number of states it must be dealt with in accordance with the respective laws of each state. Federal courts have often accepted jurisdiction under diversity, and the basis for the common law principle stems from a ruling by the United States Supreme Court; however the problem is essentially one for state courts.

While the doctrine of unfair competition is usually invoked when there is actual market competition between analogous products of the plaintiff and the defendant, the doctrine is not always narrowly confined:

The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer.<sup>11</sup>

It is held as a legal principle: "That an artistic or literary conception, if put in concrete form, is property, and as much entitled to protection against unfair competition as any other, is universally conceded, even in those cases in which relief has, for various reasons, been denied."<sup>12</sup> This principle is a long-standing one established by *Osgood v. Allen*<sup>13</sup>

The final step in applying principles of unfair competition to newsgathering was established by the ruling of the United States

Supreme Court in 1918 in *International News Service v. Associated Press*,<sup>14</sup> a case which has affected hundreds of others all over the country since 1919. It has seldom been questioned, never overturned—and was reaffirmed by the Supreme Court as recently as the 1973 case of *Goldstein v. California*.<sup>15</sup> *INS* is the only case of news piracy ever decided by the Supreme Court on the particulars of that specific problem. Other unfair competition cases to reach the high bench were either limited to procedural errors and technicalities or dealt with different details.

### *INS—The Common Law Precedent*

*International News Service v. Associated Press*, 1918<sup>16</sup> started when AP sued INS for an injunction to prevent INS from taking news directly from AP and selling it to its own clients. AP objected that some of its members in the West were not receiving news as quickly as INS customers were receiving the pirated material. AP also accused its competitor of bribing employees to furnish news before publication, a charge it was able to substantiate.

INS did not deny clipping news from AP member newspapers or copying it from AP bulletin boards. (A denial would have been virtually impossible since the news in question was coming off the AP's European cables. INS had no international cables at that time and, in fact, did not have any means of originating news in Europe. William Randolph Hearst, owner of INS, had been in the habit of running pro-German editorials and news originating in Germany in the early days of World War I. In retaliation, the Allies refused to let INS reporters into their countries or to let anyone transmit information to INS by any means.)<sup>17</sup>

The original INS defense was that the news was public property from the moment that it happened, hence nobody had any property rights in it. The U.S. District Court found in favor of INS. On appeal, however, the U.S. Circuit Court of Appeals reversed the lower court and held that AP was entitled to an injunction against INS to restrain unfair competition in copying news items and using them as its own. Because of the precedent-setting nature of the decision, the Court of Appeals suggested a Supreme Court review. INS then asked the Supreme Court to grant *certiorari* and the high court agreed to hear the case.

In arguments before the Supreme Court INS based its case on eight contentions:

- 1) Facts are public, not private property.
- 2) Under common law, in the absence of copyright, publication amounts to a dedication to the public and confers a universal right of reproduction whether for gain or not.
- 3) The fact that no precedent exists is evidence that a principle does not exist on which the right may be based.
- 4) A corporation cannot bring suit for its stockholders.
- 5) No elements of unfair competition are to be found in the case.
- 6) AP has done the same thing to INS and so cannot sue.
- 7) The author of a narrative news event has no property right under English common law.
- 8) Since INS bought the facts of news in buying the newspapers, it had a right to do what it wanted with them, including reselling the facts to its own clients.

The AP answered with five basic arguments of its own: news as a business commodity is property; a property right does not disappear with the first publication of news but continues as long as the news has property value; publication of news affects its rights in the same way as a public performance affects a play; the injunction is legitimate both under common law and under the Federal Trade Commission Act against unfair competition; and the INS argument of unclean hands is without foundation in law or fact.

Eight months after the original arguments, the Court voted seven to one (with one abstention) in favor of the Associated Press. Mr. Justice Pitney wrote the opinion for the Court. Concurring opinions voicing some reservations were written by Mr. Justice Holmes and Mr. Justice McKenna. Mr. Justice Brandeis wrote a dissent.

In its decision, announced December 23, 1918, the Court concerned itself specifically with that part of the injunction against copying news from bulletin boards and from early editions of newspapers with the intent to resell to customers. It then reduced the issues to three questions: whether there is any property right in news; whether, if there is property right in news collected for the purpose of being published, it survives the instant of publication in the first newspaper to which it is communicated by the newsgatherer; and whether the defendant's admitted course of conduct in appropriating for commercial use matter taken from:

bulletin boards or early editions of AP member publications constitutes unfair competition in trade.

The Court went to great lengths to distinguish the substance of the information from its form—the collection of words in which the writer communicated it. News articles which possess a literary quality may have copyright protection. The Court dismissed as not central the question of property in news matter at common law and the application of the Copyright Act.

The Court saw the question as one of unfair competition in business. It was granted that neither party had any remaining property interest in uncopyrighted news matter after the moment of publication *as against the public*, but that this did not mean there was no remaining property interest in it *as between themselves*. The Court found that as stock in trade news must be considered, as between AP and INS, quasi property.

The Court saw news piracy as unauthorized interference with legitimate business at the point where the profit is to be reaped in order to divert a portion of the profit from those who have earned it. The Court termed this definitely unfair competition.

Mr. Justice Pitney's decision denied the contention that news is abandoned to the public for all purposes when it is published and concluded that the question is one of intent. AP did business with the intention of serving only its members, since that was the only way to make a profit. Publication was for the limited benefit of members' readers. AP was not being given a news monopoly and the order was not to prevent the reproduction of news articles; the order concerned itself only with unfair competition.

The Court saw the entire system of appropriating AP news and transmitting it as a commercial product to INS clients as false representation—to them and their newspaper readers—that the news transmitted was the result of the defendant's own effort. It went on to explain the difference between news piracy, which it held illegal, and the accepted practice of "news tips."

The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. . . . The other use is to take the news of a rival agency as a "tip" to be investigated and if verified by independent investigation, the news thus gathered is sold. . . .<sup>18</sup>

The Circuit Court of Appeals had found the tip habit "incurably journalistic" and saw "no difficulty in discrimination between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."<sup>19</sup> The Supreme Court agreed:

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification; . . . both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business.<sup>20</sup>

The majority then affirmed the injunction issued by the Circuit Court of Appeals which "restrains any taking or gainfully using of complainant's news, either bodily or in substance, from bulletins issued by the complainant or any of its members, or from editions of their newspapers, *'until its commercial value as news to the complainant and all its members has passed away.'*"<sup>21</sup> The Court was not willing to limit the decision to a definite time period or to definite newspapers. It is this broad wording that gives the ruling such strength as precedent.

Mr. Justice Brandeis wrote a strong dissent adhering to more traditional legal principles. He saw *INS* as merely using the AP product without making compensation, not as seeking profit from the reputation of AP. Brandeis stated that *INS* had a legal right to use AP news since the product involved was not property—a direct denial of its being an equity case. Since Congress had been unwilling to pass a bill giving a time limit to news as property, Brandeis did not want the Court to establish a new rule of law. This view has been used since in arguments against the *INS* precedent, but it has never been sustained in court. Lower courts which have tried to change the precedent have been overruled on appeal.

*INS*, then, leaves us with four major legal precedents:

*Literary Property—News.* As between rival newsgathering and publishing agencies news must be regarded as quasi property . . .

*Unfair Competition—Pirating News—Property Rights.* No general and absolute property in news as such is essential to the right of a news-gathering and publishing agency to protection in a court of equity against unfair competition by a rival agency.

*Equity—Clean Hands—Relief Against Pirating News.* The practice of a news-gathering and publishing agency of taking the news of a rival as a "tip" to be investigated, and, if verified by independent investigation, of utilizing gainfully the

result of the investigation, does not necessarily show such an unconscientious and inequitable attitude towards its rival . . . as to fix upon it the taint of unclean hands and debar it on that ground from relief against the bodily appropriation of its news matter by such a rival. . . .

*Injunction—Against Unfair Competition—Pirating News.* A co-operative association of newspapers organized for gathering, distributing, and publishing of news may enjoin a rival news agency from selling as its own news taken from the bulletins issued by the former association or any of its members, or from newspapers published by them.<sup>22</sup>

Broadly interpreted, these principles are the basis of the common law as we know it today.

### *The Precedent Develops*

There may be a moral obligation for any news medium to have a reporting staff, but such is not always economically feasible. Weaker media often resort to news piracy, and these are often the electronic media. When radio was a new medium, there was no precedent to guide equity cases when radio pirated from non-radio sources. When problems arose, the courts turned to *INS* for precedent.

The first major cross-media case once again involved the Associated Press as plaintiff. In 1935 the AP as a New York corporation sued radio station KVOs, Inc., in the state of Washington to enjoin the piracy of news items from three member newspapers in that state.<sup>23</sup> The cross-country suit assured diversity in the case so that it could be tried in federal court.

At that time AP did not offer news service to radio stations. Some radio news was supplied by the United Press and International News Service, but basically KVOs relied on the Radio News Association of New York. The AP charged that KVOs was appropriating news from the *Bellingham Herald*, the *Seattle Post-Intelligencer* and the *Seattle Daily Times* and broadcasting it before these newspapers could reach their subscribers.

The Federal District Court refused an injunction against KVOs, but the Circuit Court of Appeals agreed to hear the case under the precedent of the *INS* case and indicated it was interested in its First Amendment implications. The court found that without question KVOs had pirated news in 153 of the 180 instances of which the station had been accused, and probably had in the other 27. It

dismissed the contention of KVOs that radio was unique in that listeners received its services free of charge. The court concluded that advertising sales for radio time were the equivalent of advertising sales for newspaper space, making the radio station liable for the same rules of unfair competition that guide newspapers, as laid down in the *INS* case:

KVOs' business of publishing, by the broadcast of combined advertising and the pirated news, for the profit from its advertising income constitutes unfair competition with the newspapers' business of gathering the news pirated by KVOs and publishing it combined with the advertising, seeking the profit both from the advertising service and from the subscription of its readers. . . .<sup>24</sup>

The court also approached the constitutional question in an interesting manner:

When the Constitution speaks of freedom of the press, it refers to the freedom of private and nongovernmental persons or bodies, engaged in news gathering and dissemination, from the interference by governmental agencies. That is to say, that the public function in the gathering and dissemination of news is presumed by the Constitution to be in private hands.

Under our capitalistic system this means that news distributed as a public function will be in large part by businessmen acting under the inducement of the profit motive. The public therefore has an interest in protecting the business of news gathering and disseminating agencies against the impairment of their efficiency, by the inevitable reduction of their business income through the misappropriating of news prior to the expiration of the time during which the Supreme Court has held that there exists in it a "quasi property" interest.<sup>25</sup>

The court ordered the granting of an injunction restraining KVOs from appropriating and broadcasting any of the news gathered by the Associated Press for the period following its publication in AP member newspapers "during which the broadcasting of the pirated news to KVOs' most remote auditors may damage the complainant's papers' business of procuring and maintaining their subscriptions and advertising."<sup>26</sup>

It seemed the comprehensive decision by the Court of Appeals would extend the *INS* precedent to broadcasting, but this was not to be the case. The Supreme Court granted a writ of *certiorari* to KVOs and heard the case in 1936.<sup>27</sup> No opinion was given on the relevance of the evidence or the applicability of the *INS* case as precedent. The decision of the Court of Appeals was set aside and the case was remanded to the District Court for retrial on the basis of technical errors in both the lower court and the Circuit Court of Appeals. This Supreme Court action failed to amplify the *INS*

precedent and set no specific direction for its application. This resulted in misapplication of the *INS* decision in cases involving recorded music and radio broadcasting, causing some confusion until 1940.

In 1938, orchestra leader Fred Waring sought an injunction against radio station WDAS to stop the unauthorized playing of his records on the air.<sup>28</sup> *INS* was introduced by the court as an "authority" for protection from unfair competition. *INS* is quoted extensively in the decision which ruled that equity "will protect an unfair appropriation of the product of another's labor or talent."<sup>29</sup> WDAS had utilized Waring's music for profit. "Publication of the Orchestra's renditions was a dedication of them only to purchasers for use of the records on phonographs, and not competitive interest."<sup>30</sup> An injunction against the playing of Waring's records on WDAS was issued by the court.

Waring brought another successful suit in the District Court in North Carolina in 1939 in which the court found that "an orchestra leader who had created a distinctive style in interpreting musical numbers" was entitled to an injunction on the ground of "unfair trade practice," restraining the radio station operator who was not a distributor from "using electrical transcriptions of an orchestra's renditions bearing notice that the transcriptions were limited to use only on a particular program by distributees."<sup>31</sup>

This particular case came to a dead end only a year later. In an original case in 1939 R.C.A. won an injunction in Federal District Court in New York preventing orchestra leader Paul Whiteman from authorizing radio broadcasts of his R.C.A. records.<sup>32</sup> The lower court fell in line with the Waring decision and went even further by stating that the record label did not even have to contain a restrictive notice in order to enjoin a radio broadcast under the concept of unfair competition. But on appeal the U.S. Circuit Court of Appeals reversed the lower court decision,<sup>33</sup> ruling that a "radio broadcasting company would not be enjoined from broadcasting phonograph records throughout the United States and Canada merely because the act was unlawful in Pennsylvania, since granting of an injunction would be an obvious misuse of the writ which goes only in the aid of justice." A radio station would not be enjoined from "using phonograph records on its broadcasts on the theory that to do so was 'unfair competition.'"<sup>34</sup>

The only path left open by the court would entitle an orchestra leader to enjoin for unfair competition if the radio station declared that the records were a broadcast of the orchestra leader's performance. No suit has ever been brought under this somewhat obtuse principle.

The U.S. Supreme Court denied a writ of *certiorari* in the *R. C. A.* case and so put an end to this interpretation of unfair competition as applied to the media. After this the application of the *INS* precedent reverted to the more traditional channels.

In 1942 the Federal District Court in California presented as an incontrovertible fact the principle that news is quasi property which has a specific value to the gatherer. Again the Associated Press was plaintiff in the case, *Associated Press v. Emmett*.<sup>35</sup>

The Oxnard (California) *Evening Press* was a contracted member of the Associated Press and a signatory to its By-Laws. In 1940, three years after joining, the paper merged with the Oxnard *Courier* and gave the AP six days' notice that it would no longer honor its contract. AP By-Laws required a notice of two years for withdrawal and did not allow for unilateral action on either side. The bulk of the decision is taken up with details on contractual rights and obligations. But the court took pains to point out that the news in question was definitely property and definitely salable. AP was declared to have property rights in news as a consequence of expenditures made in news gathering.

Protection from unfair competition under the *INS* precedent was also pointed out as one of the most tangible benefits of AP membership, since it conferred an immunity from prosecution for unfair competition if the news of one AP member was used by another:

The member acquires the rights to use their news without paying for them after publication. He may take the Los Angeles Times and rewrite a whole story, which bears the AP mark. He may take the Bull Dog edition of this metropolitan newspaper, and if he gets it at 7 o'clock in the evening at Oxnard, he may rewrite a good portion of the whole edition and fill his rural newspaper, which does not reach the streets of Oxnard until the next day. He is limited only to the place specified.<sup>36</sup>

The court then pointed out that the property right of news was of great financial value. Article III, Section 7 of the AP By-Laws, which gave exclusive news rights within a territory to members, derived its value through the application of the *INS* precedent.

A dispute in Sitka, Alaska, between two one-time friends provided the next major federal court test of protection from news piracy. Two separate cases, both entitled *Veatch v. Wagner*, were heard by the Federal District Court in Juneau in 1953;<sup>37</sup> both alleged cross-media piracy from a newspaper by a radio station. The defendant radio station in Sitka was broadcasting Associated Press news from the newspaper only moments after the newspaper was on the street. The newspaper claimed loss of advertising and subscriptions and asked for damages as well as an injunction against piracy. The newspaper owner originally asked the AP to intercede on his newspaper's behalf. However, instead of bringing suit against the radio station owner, the AP sales representative sold him an associate membership and left town. After unfruitful negotiation with all parties the newspaper brought the case to court.

The District Court agreed to hear the case as unfair competition, citing both *INS* and *AP v. KVOZ*, and ruled that the duplicity of the AP representative did not relieve the station of responsibility. The court held that a full AP member was entitled to sue an associate member if parts of the full service were being unlawfully appropriated. (The radio station had continued to read the edited news from the newspaper rather than editing its own AP copy.) The injunction was granted.

The second case for damages was heard later the same year and this time the judge came down hard for the protection afforded under the principle of unfair competition:

... (T)he appropriation of the product of a competitor constitutes unfair competition irrespective of whether the extent of unjust enrichment can be determined. . . . The decisions [*INS* and *AP v. KVOZ*] foreshadowed the development of the concept of unfair competition, theretofore limited almost exclusively to "palming off" cases, to include unjust enrichment through the appropriation of the fruits of another's toil.<sup>38</sup>

The court said a recognition of this development was implicit in the employment of the broader term "unfair trade practices" to describe this particular tort in the introductory note to Chapter 35, 3 *Restatement, Torts*. The court then made note of its own authority:

... It is also worthy of note that Congress has left it to the Courts to determine the scope of "unfair competition." . . . The courts would be derelict, indeed, if they failed in the development of the law in traditional fashion to serve the expanding needs of society. And there is no incompatibility between paramount public in-

terest in the dissemination of news and the prevention of unconscionable business practices. It may therefore be concluded that one may no longer earn his bread by the sweat of someone else's brow.<sup>39</sup>

The newspaper could not make a strong case for actual monetary loss, but nominal damages were awarded. The radio station agreed to cease pirating news and the original injunction was not extended. But the court made it clear it would intervene swiftly if piracy appeared later.

This brief survey shows that the Supreme Court decision in *INS* was not an isolated case but served as an important precedent in deciding other cases. The cases surveyed are quoted liberally in hundreds of other parallel cases in the same periods. The cross-media aspect of news piracy is also important. Local radio stations and local newspapers are frequently in dispute, but to the present time *INS* and its logical offshoots have prevailed. With the exception of its apparent misapplication in the Waring and Whiteman cases, the *INS* precedent does not seem to have been misused.

#### *Pottstown Has the Last Word*

The natural antagonism between print and electronic media was not finally laid to rest in Sitka but continued for ten more years. At the heart of the matter was economics. While newspapers often have a monopoly in a single market, the advertising dollar is usually divided among a daily newspaper, a weekly newspaper, free shoppers, several radio stations and local or regional TV, not to mention CATV systems now in being or on the horizon.

Since economics often make it impossible for all media to have reporting staffs, a solid local reporting staff is often maintained by only the strongest competitors in the market. The inevitable result is that the weaker media often resort to news piracy. There is a long history of scissors-and-paste-reporting in American journalism. The earliest newspapers clipped and ran news from foreign newspapers, and legitimate editorial exchanges kept the frontier newspapers provided with material. The advent of the wire services and rapid communications made these earlier practices unnecessary, at least for the more ethical media. The use of uncopyrighted, dated material is still legally acceptable, but piracy of immediate material by a direct competitor is what is illegal.

In the continuing dispute between newspapers and broadcasters a precedent-making decision was handed down by the Supreme Court of Pennsylvania on July 2, 1963. *Pottstown Daily News Publishing Company v. Pottstown Broadcasting Company* (WPAZ)<sup>40</sup> prevents radio stations from pirating material from newspapers. WPAZ was accused of using local news gathered and printed by the Pottstown *Mercury* without authority. The Pottstown Daily News Publishing Company, publisher of the *Mercury* (referred to in the decision as the News Company), instituted an action in equity in the Court of Common Pleas of Montgomery County in September, 1960, against the Pottstown Broadcasting Company (Broadcasting Company), the owner of WPAZ, to enjoin the radio station from further appropriation of local news without permission.

The News Company originally asked for relief under copyright laws based on the blanket copyright entered for each edition of the paper. Unfair competition was implied, but not specified, in the complaint:

The gist of the News Company's complaint is that its newspaper and the radio station both "disseminate news to the same general area and sell advertising within the same area"; that the News Company expends considerable money to operate its newspaper and particularly "to develop its sources of local news, train personnel, and to accurately and concisely compose local news items"; such specialized treatment of local news being the principal factor in its circulation and sale of advertising copy; that the News Company "has copyrighted such local news items" . . . that the Broadcasting Company, "without license, permission or authority," uses the local news gathered by the personnel of the News Company and published in its newspaper, for its own daily broadcast of news "in violation of the right that the [News Company] has obtained by copyrighting and also violates the property rights of the [News Company] in the aforesaid news items."<sup>41</sup>

The court declined to hear arguments under copyright law, since the federal courts have exclusive jurisdiction there, but did agree to hear the case on the basis of unfair competition, which is in the domain of the individual states. WPAZ objected to the state court's decision to accept jurisdiction and appealed. The result was that all arguments were ultimately heard by the Supreme Court of Pennsylvania.

The Broadcasting Company first claimed that the federal courts had exclusive jurisdiction in the case because it involved copyright law. The Pennsylvania Court agreed that it could not hear arguments on copyright, but claimed jurisdiction under the com-

mon law action of unfair competition. WPAZ countered that there was no common law property right in news upon which a claim of unfair competition could be predicated. It contended that even if unfair competition were a possibility, it would still have to be heard by the Federal District Court under the general umbrella of copyright.

The court cited *INS* as precedent for a property right in news. It went even further in its definition of unfair competition by citing the opinion of Mr. Chief Justice Hughes in *Schechter Poultry Corp. v. United States*.<sup>42</sup>

"Unfair Competition," as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. . . . In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation.<sup>43</sup>

*Associated Press v. KVOZ* was also cited as background in the consideration of news piracy and the court indicated its approval of the injunction issued in that case. It also quoted an article by Zechariah Chafee, Jr., on "Unfair Competition" which said: ". . . the Supreme Court [in *International*, *supra*] established the proposition that news while fresh is protected from appropriation for gainful purposes, even if the appropriator is not a rival news agency but is, for example, a radio broadcasting station."<sup>44</sup> The *INS* precedent had been adopted by Pennsylvania courts in *Waring v. WDAS*.<sup>45</sup>

In its decision the court reiterated that unfair competition was a serious enough charge that it did not have to be specified in the complaint: the court felt compelled to interpret the case as unfair competition whether it was pleaded that way or not. It also firmly established the competitive status of newspaper and broadcast media:

In this day and age no court can fail to take note of the fact that newspapers, radio and television stations compete with each other for advertising which has become a giant in our economy. In fact, the presentation of news and entertainment has become almost a subsidiary function. . . . Advertising is the life-blood of newspapers, radio and television and the presentation of news by all three media is a service designated to attract advertisers.<sup>46</sup>

Taking into consideration the circumstances and the character of the business of the respective parties, the court noted that ". . . the News Company has a commercial package of news items to service its advertising business upon which to base a cause of action in tort

against a competitor allegedly converting the news items to its own uses in pursuit of advertising."<sup>47</sup> The court acknowledged that the distinction which it drew was fine:

... [F]or the purpose of an action of unfair competition the specialized treatment of news items as a service the newspaper provides for advertisers gives to the News Company a limited property right which the law will guard and protect against wrongful invasion by a competitor. . . .

Competition in business is jealously protected by the law and the law abhors that which tends to diminish or stifle competition. While a competitor may, subject to patent, copyright, and trademark laws, imitate his rival's business practices, processes and methods, yet the protection which the law affords to competition does not and should not countenance the usurpation of a competitor's investment and toil.<sup>48</sup>

The state Supreme Court found against Pottstown Broadcasting Company and continued the injunction issued by the lower court.

Pottstown Broadcasting kept the case alive by trying to remove jurisdiction to the federal courts. The United States District Court finally heard arguments on November 22, 1965 (more than five years after the original action had been filed), in a case again entitled *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*<sup>49</sup> In the year after the decision in the *Pottstown* case by the Pennsylvania Supreme Court, unfair competition litigation was clouded by the U.S. Supreme Court decision in *Sears Roebuck & Co. v. Stiffel Company* and *Compco Corp. v. Day-Brite Lighting, Inc.*<sup>50</sup> Disagreeing with the contention of Pottstown Broadcasting that *Sears* and *Compco* overruled the Pennsylvania court, the district court ruled that while federal courts do have exclusive jurisdiction under copyright law, this does not preclude the right of a state court to decide a case on the merits of unfair competition.

The court then made an important point by defining the differences between "copying" an unpatented or uncopyrighted product and an unwarranted "appropriation" of a competitor's news, saying that it is in this "misappropriation" realm that piracy cases have their merit. The court continued:

Another reason for supporting our conclusion that the rationale of the *Sears Roebuck* case does not preclude an action based on a state unfair competition law for an invasion of a property right in uncopyrighted news, for instance, is that any other construction would leave a glaring loophole in the law. For example, in the case at hand let us assume that defendant's contention that local news items are not capable of being copyrighted is sustained. Assume further that defendant's radio station has in fact "pirated" news items which were gathered and written by

plaintiff's employers. To remedy such a violation, the plaintiff obviously would have no cause of action under the federal copyright laws.

Furthermore, if defendant's interpretation of *Sears Roebuck* is correct, plaintiff would likewise be unable to maintain an action for unfair competition under the laws of Pennsylvania. The result would be that defendant could wait patiently every day secure in the knowledge that it could supply its radio listeners with news items gathered through the expense and labors of plaintiff's reporters and "pirated" from plaintiff's newspaper which is distributed at approximately three A.M. each morning except Sunday. The ultimate security, of course, would lie in the certainty that defendant would be untouched by either state or federal law. Men of conscience would hardly condone such an inequitable result and we, as a court of conscience, will not subscribe to such a conclusion unless the Supreme Court enlightens us with a clear ruling on this specific problem.<sup>51</sup>

The court ruled that since the Copyright Act would not prevent WPAZ from using the *Mercury's* news items as a basis for its newscasts, the state unfair competition laws could afford such protection:

... [I]t is our opinion that whether plaintiff's news items are copyrighted or uncopyrighted, is immaterial to the question of whether "piracy" of such items, if proved, can be remedied in the state courts. We conclude that in either case the *Sears Roebuck* decision does not preclude state court jurisdiction over the cause of action for invasion of property right and unfair competition, based upon defendant's alleged appropriation of plaintiff's news items.<sup>52</sup>

The ruling in favor of the News Company entitled the *Mercury* to the broadest possible protection available under any applicable law.

The *Pottstown* cases have since been cited in numerous unfair competition trials. In the area of news piracy they maintain legal status second only to *INS*. While the judgments have been questioned by various defendants, they have never been questioned by another court decision. The extensive references in the second *Pottstown* decision to the *Sears* and *Compco* cases are also important since defense attorneys in unfair competition cases have been trying to use these cases to build a bridge over the *INS* and *Pottstown* precedents.

The five-year history of the *Pottstown* cases resulted in substantial legal and court costs, all of which were assessed against WPAZ. This was reason enough for not accepting the challenge thrown down by the U.S. District Court to take the arguments further up the ladder. In the end WPAZ had to hire its own reporters.

The tendency of the courts has been to impose stringent sanctions in news piracy cases. For example, in November, 1966, the Madisonville *Messenger's* parent company, the Madisonville Publishing Company, was granted an injunction by the Hopkins County (Kentucky) Circuit Court to stop a local radio station from pirating its news items. The decree prohibited the radio station from broadcasting local news that appeared in the *Messenger* until a minimum of 20 hours after publication.<sup>53</sup> This was a punitive measure; it meant that if the *Messenger* chose to cover a story, the radio station could not broadcast the material until the next day even if the station sent its own reporter. These 20-24 hour punitive measures have been used by the courts since at least 1956. In that year an Ohio court ruled in favor of the Toledo *Blade* and *Times* by issuing an injunction against WOHO. The radio station was prohibited from broadcasting newspaper items in either their original form or a rewording of them for 24 hours after publication in the newspaper.<sup>54</sup> Successful prosecution for news piracy could thus end the effectiveness of the offending news medium in a given market.

Despite the staggering First Amendment implications involved in the actions of these local courts, there is no record of these decisions having been pursued further. In both of these cases the local courts went further in punishing unfair competition than there is any reason to believe the *INS* precedent allows. Higher courts were never asked to interpret these actions.

It seems evident that a newspaper will receive injunctive relief far more readily in a case of unfair competition based on *INS* and *Pottstown* than on copyright infringement based on the federal Copyright Act. With the exception of a few states, the common law path is the logical one to follow when confronted with news piracy.

### *The Supreme Court—Toward Clarification*

The United States Supreme Court re-entered the arena of unfair competition in 1964 with two separate—but related—decisions, *Sears, Roebuck & Co. v. Stiffel*<sup>55</sup> and *Compco Corp. v. Day-Brite Lighting, Inc.*<sup>56</sup> They engendered serious debate as to what is the reigning precedent in unfair competition, a debate which finally had to be resolved by the high court in 1973.<sup>57</sup> Even though these two decisions specifically relate to physical property, the reasoning

of the Court has been extended into the realm of literary property and news piracy.

The *Sears* ruling came first. Stiffel secured design and mechanical patents on a pole lamp which Sears copied and marketed at a lower price. Stiffel brought the original action against Sears in U.S. District Court in Illinois claiming both patent infringement, a federal offense, and unfair competition, a state issue. It was argued that by selling copies of Stiffel's lamps Sears had caused confusion in the trade as to the source of the lamps and had therefore engaged in unfair competition under Illinois state law.<sup>58</sup> The District Court, after holding the patents invalid for want of invention, found Sears guilty of unfair competition. An injunction was issued against selling a similar product and an accounting was ordered to fix profits and damages resulting from Sears' alleged unfair competition.

The U.S. Court of Appeals affirmed the judgment of the lower court, holding that to make out a case of unfair competition under Illinois law there was no need to show that Sears had been "palming off" its lamps as Stiffel lamps. The court held that the remarkable sameness of the lamps could cause confusion and that this confusion was itself enough to sustain an action for unfair competition.<sup>59</sup>

*Certiorari* was granted by the U.S. Supreme Court to consider whether a state's unfair competition law could, consistent with federal patent laws, impose liability for or prohibit the copying of an article which is protected neither by a federal patent nor by copyright. The Court examined the case in light of the powers of Congress under Article I, Section 8, Clause 8 of the Constitution "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Under this power Congress had enacted federal patent and copyright laws starting in 1790.

... These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. . . . When state law touches upon the area of these federal statutes, it is "familiar doctrine" that the federal policy "may not be set at naught, or its benefits denied" by the state law. . . . This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.<sup>60</sup>

The Court was obviously concerned that the rightful powers of Congress not be usurped by the states.

The Illinois unfair competition law was seen as an illegal protective shield thrown up to keep private what should be in the public domain:

... Just as a state cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.

In the present case the "pole lamp" sold by Stiffel has been held not to be entitled to the protection of either a mechanical or a design patent. An unpatentable article, like an article on which the patent has expired, is in the public domain and may be sold by whosoever chooses to do so. . . . To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.<sup>61</sup>

The decision also stated that the mere inability of the public to tell two identical articles apart was not enough to support an injunction against copying or to support an award of damages for copying an item which federal patent laws permit to be copied. The Court insisted that "palming off" would be a necessary ingredient to find unfair competition in this particular case. The state could insist upon proper labeling of items, but could not prevent the copying.

The essence of Mr. Justice Black's majority opinion is found at the close of the last paragraph:

... Because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted prohibit the copying of the article itself or award damages for such copying. . . . The judgment below did both and in so doing gave Stiffel the equivalent of a patent monopoly on its unpatented lamp. This was in error, and Sears is entitled to a judgment in its favor.<sup>62</sup>

It is the specific mention of uncopyrighted material that has made the *Sears* case an attractive one to quote in media piracy cases.

*Compco* was a companion case heard simultaneously with *Sears*. Again it was Mr. Justice Black who wrote the decision, which was issued immediately after *Sears*.<sup>63</sup> Again the question was whether the use of a state unfair competition law to give relief against the copying of an unpatented industrial design conflicts with the federal patent laws.

In 1955 Day-Brite secured a design patent on a reflector for a lighting fixture. The company sought, but was refused, a mechanical patent on the same device. Compco's predecessor company began making and selling fixtures very similar to Day-Brite's. In action brought by Day-Brite one count alleged infringement of

the design patent; a second count charged unfair competition because design similarity would confuse the public and deceive purchasers. The original complaint asked for both an accounting and an injunction.

The Federal District Court held the design patent invalid, but, as to the second count, while the court did not find that Compco had engaged in any deceptive or fraudulent practices, it did find that Compco had been guilty of unfair competition under Illinois law. An injunction was issued against Compco and an accounting ordered to determine damages. The Court of Appeals upheld the decision of the lower court in finding Compco guilty of unfair competition under Illinois state law. *Certiorari* was then granted by the United States Supreme Court.

The Supreme Court was unimpressed with the evidence concerning deception and saw clear error in the findings. But instead the decision was based on reasoning from the *Sears* decision: that an order for an accounting for damages and the injunction were in conflict with the federal patent laws. The *Sears* decision was restated and then applied specifically to Day-Brite:

... Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal patent law it is, therefore, in the public domain and can be copied in every detail by whoever pleases. ... If the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will.

As we have said in *Sears*, while federal patent laws protect a State from prohibiting the copying and selling of unpatented articles, they do not stand in the way of state law, statutory or decisional, which requires those who make and sell copies to take precautions to identify their products as their own. A State of course has power to improve liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original. ... And of course a State cannot hold a copier accountable in damages for failure to label or otherwise to identify his goods unless his failure is in violation of valid state statutory or decisional law requiring the copier to label or take other precautions to prevent confusion of customers as to the source of the goods.<sup>64</sup>

This reasoning of the *Sears* and *Compco* cases therefore becomes inseparable. The Court denied a rehearing on both cases.

The original *Sears* and *Compco* cases both were concerned with patents on physical objects. The significance for intellectual property comes with the equation by the Court of copyright with patent. The less tangible area of copyright becomes even more significant

through the denial of patent protection by the lower courts. Both *Sears* and *Compco* point out that the states have powers not specifically held by the federal government. What is important is that the state laws are valid. The recognized unfair competition precedent of *INS* was not mentioned in either Supreme Court decision. It might therefore be premature to say that *Sears* and *Compco* specifically overrule *INS*. Where *INS* spoke of the unconscionable appropriation of the fruits of another's labor, this type of judgment is never made in either the *Sears* and *Compco* cases. The denial of patent and copyright for specific reasons is at the heart of the two decisions.

The impact of *Sears* and *Compco* cannot be denied. Reference to be decisions is found in almost every media piracy case tried since that time. Whenever the plaintiff claims the protection of *INS*, the defendant will likely claim the protection of *Sears* and *Compco*. The two decisions are seemingly definitive: when an item is unprotected by patent or copyright, state law may not forbid copying that item. But by not referring to *INS*, the Supreme Court left the validity of the piracy doctrine in doubt.

Michael H. Ahrens makes some interesting observations on Mr. Justice Black and his decisions in *Sears* and *Compco*:

Mr. Justice Black could have decided the case on narrower grounds. He could have merely stated that the lower courts misapplied their own unfair competition law. He could also have talked in terms of statutory preemption. . . . But Justice Black, as usual, decided to talk in absolutes, and by doing so has cast much doubt on the entire field of unfair competition law.

. . . It is hard to believe that Black intended to overrule this entire field of misappropriation without even mentioning the *INS* decision. If Black and the *Sears-Compco* courts really believed that the decisions they were handing down concerning preemption by the patent laws was going to overrule an entirely different and separate field of common law misappropriation, they would have said so.<sup>65</sup>

This may have been legal second guessing, but it did provide part of the grounds for not throwing away the *INS* precedent.

Even though *INS* was not overruled, however, the *Sears* and *Compco* decisions cast doubt over unfair competition litigation until 1973. During this nine-year period there was a difference of opinion among legal scholars as to the status of piracy cases. Some jurists felt that only Congressional action through inclusion of the category of unfair competition in the proposed Copyright Act revi-

sions would clarify the ambiguities.<sup>66</sup> Others felt that a definitive new Supreme Court ruling was needed while still others looked to the flexibility of the courts to respond individually to each situation.

The early battles between narrow and broad interpretations of *Sears and Compco* were relatively evenly balanced. The tendency in more recent years, however, has been towards the narrow interpretation, with the continued acceptance of the *INS* precedent. In two California cases complex and tightly reasoned opinions favor the narrow interpretation. *Capitol Records, Inc. v. Erickson*<sup>67</sup> was a record piracy case covered under California Penal Code, Section 653h, and also California Civil Code, Section 3369, the state unfair competition law. The case was heard by the California Court of Appeals. *Tape Industries Association of America v. Younger*<sup>68</sup> was involved with the same California unfair competition statutes, but was heard in Federal District Court under the question of copyright.

While both of these cases involved recorded sound, the misappropriation doctrine that finally prevailed was based on the *INS* precedent. These cases were decided on the basis of unfair competition since at this time the federal Copyright Act did not protect sound recordings. The only available action for record companies wishing to protect themselves from tape pirates, who were doing an estimated \$100,000,000 in illicit business a year, was through action in individual state courts. Unfair competition litigation in this area was important until Congress revised the Copyright Act on October 15, 1971. In anticipation of the eventual complete revision of the Copyright Act, sound recordings were given copyright protection for the first time from February 15, 1972 until January 1, 1975. (The latter date was extended to the passage of the new Copyright Act on October 19, 1976, which took effect January 1, 1978). All cases before February 15, 1972, have been heard under state unfair competition rules.<sup>69</sup>

*Capitol Records* was a fight between the major record producer and Phoenix Tapes, a pirate recording firm. Phoenix purchased Capitol records and tapes on the open market, made master recordings of them, and then produced tape cartridges to be sold to the public. A label was affixed to each pirated tape stating that it was produced without permission. Capitol spent in excess of \$100,000 to record an album which Phoenix then bought for \$5.95 and

reproduced. Capitol was issued an injunction against Phoenix on the basis of California's unfair competition laws.

Phoenix, the appellant, contended that the court had erred in granting the preliminary injunction. It argued that its conduct in duplicating Capitol recordings without permission and selling the duplicated recordings in competition with Capitol was condoned by the decisions in *Sears* and *Compco*. It was contended that a state court could not, on the theory of unfair competition or otherwise, enjoin the conduct of Phoenix. The California Court of Appeal reviewed the *Sears* and *Compco* decisions and then noted that neither opinion made reference to the Supreme Court decision in *INS*. The court then summarized *INS* and added the reinforcement of the *Pottstown* cases. The court also noted that after *Sears* and *Compco* both state and federal courts had granted injunctive relief on the basis of misappropriation of uncopyrighted material by a competitor.

The reasoning of the court hinged on establishing different legal principles for copying and appropriating. One of the sources quoted by the court was Goldstein in the *Columbia Law Review*:

... State courts and lower federal courts, sitting in diversity jurisdiction, have, not unexpectedly, relied upon the misappropriation-common law copyright nexus as a facile means for escaping the broad dictates of *Sears* and *Compco*. Specifically, lower court decisions have read the cases as prohibiting state injunctions against copying but not against appropriations—the distinction being between, the duplication of one's work by another—copying—and 'the use of the identical product for the profits of another'—misappropriation.<sup>70</sup>

The court then said of the *Sears* and *Compco* decisions:

... Neither of those learned decisions stands for the proposition that this plaintiff is not entitled to protection against the unauthorized appropriation, reproduction or duplication of the actual performances contained in its records.<sup>71</sup>

In reviewing California statutes in the *Capitol* decision the court found the laws valid in light of the continued acceptance of the *INS* precedent. The conduct of Phoenix was officially branded by the presiding judge as unfair competition and a clear case of misappropriation. The preliminary injunction was therefore continued. This decision lent major support to the doctrine of misappropriation.

*Tape Industries*,<sup>72</sup> decided in July, 1970, by the United States District Court, was a tape piracy case in which action under the

California unfair competition laws had been brought by Los Angeles County District Attorney Evelle J. Younger. Some complex legal questions on court jurisdiction had to be resolved before the court could deal with the unfair competition question. Tape Industries contended that California's tape piracy and unfair competition laws were in conflict with the copyright clause of the United States Constitution. An injunction was being sought against the Los Angeles District Attorney in an attempt to prevent him from instituting action under California law.

The problem in this case stemmed from the same kinds of action as those in the *Capitol* case. Tape Industries was purchasing phonograph records on the open market and using them to produce cartridge tapes. Each unauthorized tape included a label stating that it had been reproduced without permission and without royalty. The high costs to the record companies of producing the original albums were compared to the tape pirates' negligible costs.

Tape Industries Association contended that the California laws provided quasi copyright protection for public domain material and so were in violation of the Copyright Act. It was also argued that since Congress had not granted copyright protection to the material in question, the decisions of the Supreme Court in *Sears* and *Compco* precluded California and all other states from proscribing the duplication of uncopyrighted material. While Tape Industries relied on *Sears* and *Compco*, District Attorney Younger relied on *INS*.

The plaintiffs contended that previous decisions in the broad view of *Sears* and *Compco* had invalidated the *INS* precedent. It was their argument that the method of duplication, whether by copying or appropriating, did not have any bearing on the application of *Sears* and *Compco*. The court disagreed:

In *Sears*, *Compco*, *Smith* and *DeCosta*, the defendants were not subject to state control because they merely copied the design or formula of the original producer. . . .

In contrast, plaintiffs in the instant case do not imitate the product of the record companies. They actually take and appropriate the product itself—the sounds recorded on the albums—and commercially exploit the product. *Sears* and *Compco* would cover and immunize the plaintiffs here only if they had copied and imitated the product—that is, if they had listened to the sounds performed and embodied on the records and then had expended the necessary sums to copy and imitate the sounds on their own tapes. . . .<sup>73</sup>

In the final analysis the court sided with the "conscience" interpretation of misappropriation:

When all the facts of the case here are considered, we are driven to the conclusion that Calif. P.C. §653h (1968) is a tolerable and permissible state regulation directed against theft and appropriation of a salable product, and does not unconstitutionally intrude on the Federal policies enunciated in the Copyright Clause, U.S. Const. Art. 1, § 8, cl. 8. . . . Plaintiffs in this action are known in the record industry as "tape pirates" and rightly so, for to the best of our knowledge all other courts that have had occasion to consider the conduct of such "tape pirates" have sanctioned state limitations upon their piratical activities. . . .

. . . Undoubtedly, tape pirates are costing legitimate and authorized tape producers substantial amounts of money and the State of California has properly and reasonably concluded that these parasitic tape pirates must be controlled.<sup>74</sup>

The *INS* precedent and the narrow interpretation of *Sears* and *Compco* had prevailed.

The decisions in *Capitol* and *Tape Industries* are significant because they are both carefully reasoned and come from two different court systems. If interpretations of *Sears* and *Compco* had been balanced before, they now appeared to be swinging toward the so-called narrow interpretation, meaning that *Sears-Compco* and *INS* can exist side by side and serve different interests. This position was finally supported by the Supreme Court in the 1973 decision of *Goldstein v. California*.<sup>75</sup> This case again involved record piracy, but because the Supreme Court in its decision did not find *Sears* and *Compco* superior to *INS*, *Goldstein* has a direct relationship to unfair competition in the news media.

The defendants in the *Goldstein* case were charged with copying 140 musical performances from commercially sold recordings without permission and without making payments to artists and producers. The piracy covered a period of twelve months from April, 1970, to March, 1971. Goldstein pleaded *nolo contendere* to ten counts of violating Section 653 (h) of the California Penal Code, the record piracy section of the state unfair competition law. After Goldstein exhausted all state appellate remedies, the U.S. Supreme Court granted *certiorari* to hear arguments that the judgment should be reversed since all material not specifically protected by Congress under copyright law was in the public domain. Goldstein's attorneys urged the Court to void both the specific section of the California Penal Code and the principle of unfair competition as

found in the common law. The *Sears* and *Compco* decisions were cited as precedent.

While reaffirming *Sears* and *Compco* "in regard to mechanical configurations," the Court stated that "*Sears* and *Compco*, on which petitioners rely, do not support their position."<sup>6</sup> In taking this stance the Court was adopting what had been the interpretation of the lower courts, that *Sears* and *Compco* did not overrule the *INS* misappropriation doctrine.

In a case note appearing in the *University of San Francisco Law Review*, Dan C. Bowen pointed out that "*Goldstein* will undoubtedly be considered by many a landmark case because of its significance to the misappropriation doctrine and the use of state unfair competition law."<sup>7</sup> While Bowen charged that "the legal craftsmanship employed in the opinion leaves much to be desired,"<sup>78</sup> protection from misappropriation under the *INS* doctrine has definitely been extended to all areas that Congress has not pre-empted by statute. Even though the original five-to-four *Goldstein* decision may have indicated some doubt, the Supreme Court showed it meant the ruling to be definitive by denying a rehearing to *Goldstein* in the October, 1973, session.<sup>79</sup>

The impact of the *Goldstein* decision was proven in the first major case tried after that ruling—*National Broadcasting Co., Inc. v. Nance*.<sup>80</sup> In this tape piracy case the court held that the principle of unfair competition is no longer limited to its original application to misrepresentation by the wrongdoer in using the name of another to palm off his own product, but now embraces other schemes in which the wrongdoer uses his own name, but misappropriates the property of another.

The year 1974 was a significant one in the federal courts for the misappropriation doctrine. In the case of *International Tape Manufacturers Association v. Gerstein*<sup>81</sup> the U.S. Court of Appeals cited *Goldstein* as firm precedent in deciding the case against tape pirates. Later that year the United States Supreme Court in *Kewanee Oil Co. v. Bicron Corp.*<sup>82</sup> reaffirmed, under the precedents of *INS* and *Goldstein*, the rights of the states to control unfair competition in areas not covered by federal copyright or patent. Since that time the precedent has been followed faithfully by federal courts and adopted by numerous state courts, including

those of California, Maryland, New Jersey, Missouri and Massachusetts.

At this time it is safe to say that with the *Goldstein* decision, *Sears* and *Compco* can no longer be counted on as a defense for news piracy. With the *INS* misappropriation doctrine again in control it will be a risk to become involved in piracy. Court costs tend to run high for the loser who, just as in libel suits, is likely to be assessed all legal fees and court costs. There is also the strong possibility that damages will be assessed in addition to costs. Running a newsroom with scissors and a paste pot, then, is not only unimaginative and unethical, but also quite probably illegal. The newsroom is no place for a plagiarist. Based on historical analysis, it appears that news piracy will be punished.

# NOTES

1. Michael Moyers, "Unfair Competition after Sears and Compco," 22 *Vanderbilt Law Review* 155 (1968).
2. *International News Service v. Associated Press*, 248 U.S. 215 (1918).
3. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 797 (7th Cir. 1921).
4. William F. Swindler, *Problems of Law in Journalism* (New York: Macmillan, 1955), p. 312.
5. *Tribune Co. of Chicago v. Associated Press*, 116 F. 126 (D.C. Ill. 1900).
6. 17 U.S.C.A. 5, (b).
7. 17 U.S.C. 102, 90 STAT. 2545.
8. See *International News Service*, 248 U.S. 215 (1918) and *Inter-City Press, Inc. v. Siegfried*, 172 F. Supp. 37 (D.C. Mo. 1958).
9. See *C.J.S.*, *A.L.R.* and *U.S. Supreme Court Digest Annotated* (1949).
10. 87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 87.
11. *Ibid* §88.
12. 19 A.L.R. 949.
13. Holmes 185, 3 Off. Gay 124, Fed. Cas. No. 10,603 (1872).
14. 248 U.S. 215.
15. 93 S. Ct. 2303 (1973).
16. *Supra.*, N. 2.
17. See "The Age of Yellow Journalism," Ch. 19 in Edwin Emery, *The Press and America* (Englewood Cliffs, N.J.: Prentice-Hall, 3rd Ed., 1972).
18. 248 U.S. 215, 222.
19. 2 A.L.R. 317.
20. 248 U.S. 215, 222.
21. *Ibid.*, emphasis supplied by the court.
22. At 215, 216.
23. *Associated Press v. KVOS, Inc.*, 80 F. 2d 575 (9th Cir. 1935).
24. *Ibid.*, at 581.
25. *Ibid.*, original emphasis.
26. At 584.
27. 299 U.S. 269 (1936).
28. 194 A. 631 (Pa. 1938).
29. *Ibid.* at 640.
30. *Ibid.*
31. *Waring v. Dunlea*, 26 F.Supp. 338 (D.C. No. Car. 1939).
32. *R.C.A. v. Whiteman*, 28 F.Supp. 787 (D.C. N.Y. 1939).
33. *R.C.A. Mfg. Co. v. Whiteman*, 114 F.2d 86 (2nd Cir. 1940).
34. *Ibid.*
35. 45 F. Supp. 907 (D.C. Cal. 1942).
36. *Ibid.* at 923.
37. 109 F.Supp. 537 (D.C. Alaska 1953) and 116 F.Supp 904 (D.C. Alaska 1953).
38. 116 F.Supp. 904, 906.

39. *Ibid.*
40. 411 Pa. 383 (1963), 192 A.2d 657.
41. 192 A.2d 657, 659, emphasis added.
42. 295 U.S. 495 (1934).
43. 192 A.2d 657, 661, emphasis supplied by court.
44. 53 *Harv. L. Rev.* 1289 at 1310 (1940).
45. *Supra*, pp. 15-16.
46. 192 A.2d 657, 663.
47. *Ibid.*
48. *Ibid.*
49. 247 F. Supp. 578 (D.C. Pa. 1965).
50. A detailed discussion of these cases is given below.
51. 247 F.Supp. 578, 581.
52. *Ibid.*, at 582.
53. "Kentucky Daily Wins Radio Piracy Case," *Editor & Publisher*, Nov. 26, 1966, p. 11.
54. "Newscasts Stopped on 24-Hr News Rule," *Editor & Publisher*, November, 1956.
55. 376 U.S. 225, 84 S. Ct. 784 (1964).
56. 376 U.S. 234, 84 S. Ct. 779 (1964).
57. See discussion of *Goldstein v. California*, 93 S. Ct. 2303 (1973), *infra*.
58. At the time there was an Illinois unfair competition statute which since has been eliminated in the 1970 recodification.
59. 376 U.S. 225, 229.
60. *Ibid.*
61. *Ibid.*, at 231.
62. At 233.
63. Some confusion exists as to the ordering of the decisions when using unofficial reports because Compco somehow has a lower page number in the West "reporter" system.
64. 376 U.S. 234, 238-9.
65. See Michael Ahrens, "The Misappropriation Doctrine After *Sears-Compco*," 59 *Trade Mark Rev.* 88 (February 1969).
66. See "Unfair Competition," 40 *N.Y. Univ. Law Rev.* 101 (January 1965); Ahrens, *supra*; and Michael Moyers, "Unfair Competition after *Sears and Compco*," 22 *Vanderbilt Law Rev.* 129 (December 1968). The Ahrens article is particularly interesting since it presents the thesis of misappropriation doctrine which was finally adopted by the U.S. Supreme Court in 1973.
67. 82 Cal. Rptr. 798 (Cal. App. 1969).
68. 316 F. Supp. 340 (D.C. Cal. 1970).
69. See Title 17 U.S.C.A. Copyrights, Chapter 1—Registration of Copyright, § 1 (F) and § 5 (n).
70. 82 Cal. Rptr. 803 quoting Goldstein, "Copyright," 69 *Columbia Law Rev.* 49, 72.
71. 82 Cal. Rptr. 804.
72. 316 F.Supp. 340.

- 73. *Ibid.*, at 350-51.
- 74. At 351.
- 75. 412 U.S. 546, 93 S. Ct. 2303 (1973).
- 76. 93 S. Ct. 2303, 2316.
- 77. 8 *U. San Francisco Law Rev.* 199, 211 (Fall 1973).
- 78. *Ibid.*, at 212.
- 79. 414 U.S. 883.
- 80. 506 S.W.2d 483 (Mo. App. 1974).
- 81. 494 F.2d 27 (1974).
- 82. 416 U.S. 470 (1974).